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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ALEJANDRO MORALES,

Defendant and Appellant.

2d Crim. No. B249734
(Super. Ct. No. 2010033227)
(Ventura County)

David Alejandro Morales appeals his conviction by jury of premeditated first degree murder (Pen. Code, §§ 187, 189)¹ and assault by means likely to produce great bodily injury (§ 245, subd. (a)). The trial court sentenced him to 29 years to life state prison. Appellant claims the evidence does not support the finding that he acted with deliberation and premeditation, and the jury was misinstructed on provocation. We affirm.

Facts and Procedural History

On September 15, 2010, Maricruz Morales was beaten to death by her brother, appellant, in their Fillmore apartment. Maricruz lived with appellant and their mother, Roselia Morales, and feared appellant. Roselia and Maricruz were moving out of the apartment and told appellant he had to find his own place to live. Appellant was warned that his belongings would be thrown out at the end of the day if he did not move his stuff.

¹ All statutory references are to the Penal Code.

Appellant was gone most of the day, returned at 5:30 p.m., and said he wasn't leaving. Appellant was angry that Maricruz and Roselia were throwing his belongings in the trash. Appellant took a long shower, discovered that his bedroom was a mess, and told Maricruz to get out of the room so that he could get dressed. Maricruz ignored his demands and started throwing things at him. Appellant closed the bedroom door and beat her with a curtain rod.

Roselia heard Maricruz cry for help and ran to appellant's bedroom. Maricruz was laying face down on the floor. Appellant sat atop Maricruz, hitting and pounding her. Blood was everywhere. Roselia tried to pull appellant off but was hit in the head. Roselia ran outside and screamed "Help me. Help me. He's going to kill her! He's going to kill her!"

David Garcia, a neighbor, saw appellant straddling and hitting Maricruz, and kicked appellant off. Appellant jumped on the bed, swung a piece of bed railing at Garcia, and yelled, "Leave or I'll kill you next!"

A second neighbor, Oscar Perez, tried to rescue Maricruz and ordered appellant to let her go. Appellant was on top of Maricruz, pushing her neck against the floor. Appellant threatened Perez with a long piece of metal and forced him out of the apartment. About 10 minutes later, appellant ran out the apartment and down an alley.

Ventura County Sheriff's Deputy Jeff Smestad stopped appellant at the intersection of Casner and Market Streets. Appellant was ordered to sit down but assumed a fighting stance and tried to hit the deputy with a metal object.

Maricruz died shortly after arriving at the hospital. Officers searched the apartment and found a metal curtain rod in appellant's bedroom and a hammer outside the bedroom window. Maricruz's DNA and blood were on the hammer.

That evening, Roselia gave a taped statement to Sergeant Eduardo Reyes. Roselia said that appellant was an unemployed carpenter, had not worked in 10 years, and "he's in trouble all the time. . . . He just makes problems" Roselia asked appellant to move many times but appellant said he would kill her if she kicked him out. Roselia told

Sergeant Reyes that appellant tried to kill her nine years ago and tried to kill her earlier that day.

On March 11, 2012, Roselia visited appellant at jail. In a recorded conversation, Roselia told appellant that Maricruz had warned her that appellant would kill her someday. Maricruz pled with Roselia "[i]f you don't . . . lock him up, [if] you don't file a restraining order, he is going to kill me."

On January 13, 2013, Roselia visited appellant and asked: "Was it worth it?" and "I knew that something like [this] was going to happen" "It wasn't one blow or two, it was a thousand . . . you wanted to finish her off, not kill her. Not just kill her, finish her off."

At trial, Roselia recanted and said that Maricruz provoked appellant. Appellant was "just standing there" as Maricruz yelled and threw his belongings in the trash. Appellant told them he wanted to take a shower and leave. A few minutes later, Roselia heard Maricruz cry for help. Maricruz was face down on the bedroom floor and appellant "had already hit her." Roselia said that appellant looked "possessed."

Doctor Janice Frank conducted an autopsy and determined that Maricruz died of blunt force head trauma. Maricruz had facial and scalp injuries and bruises on the right side of her face, arms, legs and upper abdomen. The neck injuries were caused by someone choking her. Doctor Frank opined that the hammer was probably used to inflict a fatal blow to the victim's head.

Appellant claimed that the killing was provoked and that he had no recollection of hitting Maricruz with a hammer. Appellant testified that Maricruz cursed, threw a rock and a cup at him, called him a "low life," hit him with a broom, and bit his fingers. In rebuttal, the prosecution argued that no brooms were found in the apartment and appellant suffered no finger bites.

Premeditation and Deliberation

Appellant argues that the evidence does not support the finding that the killing was premeditated and deliberate. As in any sufficiency-of-the-evidence case, we review the record in the light most favorable to the prosecution and draw all reasonable inferences in

support of the judgment. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We do not reweigh the evidence or reassess the credibility of witnesses. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there substantial evidence to support" ' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Citing *People v. Anderson* (1968) 70 Cal.2d 15, appellant argues that premeditation and deliberation must be established by planning, motive, and manner of killing. " '*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]" Thus, while premeditation and deliberation must result from " ' careful thought and weighing of considerations" ' [citation], we continue to apply the principle that "[t]he process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly" [Citations.]" [Citation.]" (*People v. Bolin, supra*, 18 Cal.4th at pp. 331-332.)

Here the jury could infer motive to kill based on appellant's resentment of Maricruz who wanted appellant kicked out. On September 10, 2010, Roselia told appellant that she and Maricruz were moving to a new apartment. Appellant was angry about the move.² The day before the murder, Maricruz called the police about appellant but no action was taken. On September 15, 2010, Maricruz called appellant a loser and threw his belongings in the trash.

² The trial court found there was "animosity about having to move, this animus relationship, that he didn't do anything, that he didn't contribute, that he didn't follow the rules, that [Maricruz] was always on him, that the mother was always on him about it, that he comes home that day and is confronted with them not just yelling at him but moving his stuff or throwing away his stuff"

Premeditation and deliberation was established by the manner of killing. Appellant straddled Maricruz and choked her before inflicting the fatal blow with the hammer. A targeted, single blow with a weapon shows a preconceived design to kill. (See e.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1253 [three clustered stab wounds supported inference of deliberate killing]; *People v. Lewis* (2009) 46 Cal.4th 1255, 1293 [victim strangled to the point on unconsciousness before throat cut]; *People v. Paton* (1967) 255 Cal.App.2d 347, 352 [victim stabbed in heart; knife wounds were not wild and unaimed].) Appellant's attempt to conceal the murder weapon and failure to provide Maricruz medical attention was strong evidence of premeditation and deliberation. (See e.g., *People v. Clark* (1967) 252 Cal.App.2d 524, 529.)

The evidence also shows planning activity. After Maricruz confronted appellant about his belongings, appellant took a long shower, closed the bedroom door, and beat Maricruz with the curtain rod. Appellant put Maricruz in a sleeper hold, dressed himself, and "got her in a sleeper hold again" to silence her. When Roselia entered the bedroom, appellant was straddling Maricruz and pounding her head. After Roselia ran to get help, appellant struck Maricruz with the hammer, dropped the hammer out the window, and armed himself. Appellant's possession of a weapon in advance of the killing and his rapid escape after the killing amply supported an inference of planning activity. (*People v. Wharton* (1991) 53 Cal.3d 522, 547.)

Premeditation and intent to kill were also established by appellant's violent behavior. Appellant beat and choked Maricruz behind the closed bedroom door before hitting her with the hammer. When Garcia tried to rescue Maricruz, appellant shouted "Leave or I'll kill you next!" Appellant lunged at Garcia with a piece of bed railing and threatened to hit Perez with a long piece of metal. After Appellant ran from the apartment, he tried to hit a deputy with a metal object.

Premeditation and deliberation does not require an extended period of time, merely an opportunity for reflection. (*People v. Solomon* (2010) 49 Cal.4th 792, 813; *People v. Cook* (2006) 39 Cal.4th 566, 603.) On cross-examination, Appellant stated that he put Maricruz in a sleeper hold "[f]or a few minutes," more than enough time to make a cold,

calculated decision to kill. (See e.g., *People v. Harris* (2008) 43 Cal.4th 1269, 1286-1287.) A rational trier of fact could find, beyond a reasonable doubt, that the killing was willful, deliberate, and premeditated. (*People v. Lewis, supra*, 46 Cal.4th at p. 1293.) Appellant "simply asks this court to reweigh the facts." (*People v. Bolin, supra*, 18 Cal.4th at p. 333) and makes no showing that the conviction violated his constitutional right to due process or a fair trial. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318 [61 L.Ed.2d 560, 573]; *People v. Jennings* (2010) 50 Cal.4th 616, 649.)

People's Special Instruction - Provocation

Appellant argues that the jury was misinstructed on provocation which can raise a reasonable doubt about premeditation and reduce the homicide to second degree murder. (*People v. Thomas* (1945) 25 Cal.2d 880, 903; *People v. Rogers* (2006) 39 Cal.4th 826, 878.) Because provocation is not a defense, an instruction on provocation is treated like a pinpoint instruction that relates particular facts to a legal issue in the case. (*Ibid.*)

The trial court gave CALCRIM 522 which stated: "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter." The jury also received a heat of passion - voluntary manslaughter instruction. (CALCRIM 570.)

Over objection, the trial court gave Defendant's Special Instruction 570a which stated: "The provocative conduct by the victim may be physical, verbal, or combination of both. Words of abuse, insults, or reproach may constitute sufficient provocation. But the conduct must be sufficiently provocative that would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [¶] If is up to the jury to decide if the provocation, if any, was sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection."

The trial court next gave People's Special Instruction 570b which was drawn from *People v. Najera* (2006) 138 Cal.App.4th 212 and states: "Provocation of a slight or

trifling (trivial) character, which may include words of reproach, an assault or even a blow, is not sufficient to arouse in a reasonable man the intense emotion that obscures his reasoning and judgment and cause him to act rashly or without due deliberation and reflection."

Appellant claims that he had an absolute right to a pinpoint instruction on provocation and the prosecution has no similar right. The trial court ruled: "[I]f I give what the defense request, I think the People can request further instruction. So if you [appellant] want to propose something from *Najera* I will consider that." It did not err. A trial court must instruct on those principles of law closely and openly connected with the facts of the case. (*People v. Michaels* (2002) 28 Cal.4th 486, 530.)

" '[N]either the defendant nor the People have a right to incomplete instructions.' [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 204; see *People v. Kelly* (1992) 1 Cal.4th 495, 531 [trial court did not err in giving CALJIC 2.03 pinpoint instruction on consciousness of guilt for the prosecution].)

Appellant testified that, moments before the killing, Maricruz cursed and called him a "low life." The jury was correctly instructed that name calling may be too trivial to cause an average person to act rashly or without due deliberation and reflection. (See e.g., *People v. Manriquez* (2005) 37 Cal.4th 547, 585-586 [calling defendant a "mother fucker" and daring him to use his gun not sufficient provocation to reduce murder to manslaughter].) The special instruction did not assume facts that were not true or invite the jury to draw inferences favorable to the prosecution from specific items of evidence. (*People v. Michaels, supra*, 28 Cal.4th at p. 539; *People v. Earp* (1999) 20 Cal.4th 826, 886.)

Appellant argues that People's Special Instruction 570b lightened the prosecution's burden of proof and violates due process. The instruction is a correct statement of the law and taken almost verbatim from *People v. Najera* (2006) 138 Cal.App.4th 212. In *Najera*, the murder victim called the defendant a "faggot," a taunt that would not drive an ordinary person to act rashly or without due deliberation and reflection. (*Id.*, at p. 226.) "Although the provocative conduct may be verbal, . . . such provocation

'must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment. [Citation.] That standard was not met here." (*People v. Manriquez*, *supra*, 37 Cal.4th at pp. 585-586.)

Appellant complains that the jury was instructed that a trivial provocation *may* include words of reproach or a blow. The fair import of the instruction is that Maricruz's conduct may or may not have been provocative enough to cause an ordinary person to act rashly and without deliberation. The *Najera* instruction must be read in conjunction with the other instructions which state it is up to the jury to decide whether the provocative conduct is sufficient to find that it was not a premeditated murder. (CALCRIM 521 (murder degrees), 522 (provocation: effect on degree of murder), and 570 (voluntary manslaughter; heat of passion).

Appellant argues that the special instruction reads like a directed verdict. The jury, however, was instructed that it must find appellant not guilty of murder if the prosecution failed to prove, beyond a reasonable doubt, that appellant did not kill as the result of a sudden quarrel or in the heat of passion. (CALCRIM 570.) This was discussed by defense counsel who argued that the prosecution has to prove that appellant was not provoked and "that [appellant] was not suffering from that provocation [T]hat he had this plan, that he had this mission, they've got to prove that."

Appellant asserts that People's Special Instruction is duplicative of the other instructions. While it is true that a trial court has authority to refuse a special instruction on the ground it is duplicative (see *People v. Catlin* (2001) 26 Cal.4th 81, 152), appellant cites no authority that a duplicative instruction can result in prejudicial error. A superfluous instruction rarely has the effect of misleading the jury or denying the defendant a fair trial.

The alleged instructional error was harmless when considered in the context of the evidence and the other instructions. (*People v. Blakeley* (2000) 23 Cal.4th 82, 93.) The evidence shows that appellant killed Maricruz with premeditation, deliberation, malice, and without provocation. The jury was instructed that the test of adequate provocation is objective and that words of reproach may or may not be provocative enough to cause an ordinary person to act rashly. (*People v. Lee* (1999) 20 Cal.4th 47, 60.) Appellant argues

that the special instruction could have been more neutral but "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation.

...

' "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." ' [Citation.]" (*Middleton v. McNeil* (2004) 541 U.S. 433, 437 [158 L.Ed.2d 701, 707].)

Whatever it was that Maricruz said or did, appellant may not " ' "set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man." ' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1216.) The jury was so instructed. (CALCRIM 570.) On review, it is presumed that the jury understood and followed the instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) Appellant makes no showing that that the special instructions on provocation violated his due process rights or denied him a fair trial.

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Patricia Murphy, Judge
Superior Court County of Ventura

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